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THE VALIDITY OF CONTRACTS MADE BY A FOREIGN CORPORATION IN DISREGARD OF STATUTES REQUIRING COMPLIANCE WITH PRESCRIBED FORMALITIES AS CONDITION PRECEDENT TO DOING BUSINESS WITHIN THE STATE.—A corporation of one State may exercise any or all of its powers in another State unless the latter State by its public policy or express legislation prohibits the exercise of such power.[1] On the other hand, the State's right to refuse this privilege, and to exclude arbitrarily a foreign corporation from the exercise of its corporate franchise within the State is not to be questioned.[2] It logically follows that a State may constitutionally impose such conditions and restrictions, not repugnant to the Constitution and laws of the United States, as it sees fit upon a foreign corporation's right to do business in the State.[3] In the exercise of this power, practically all the States have enacted laws requiring foreign corporations to comply with certain formalities, such as filing a copy of its charter in the State, and appointing a resident agent upon whom process may be served, as conditions precedent to doing business within the State. Such statutes are supervisory in their nature, and are enacted for the protection of citizens from the acts of an irresponsible body.[4]

[1] Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964; People *v.* Fidelity, etc., Co., 153 Ill. 25, 38 N. E. 752.
[2] Huffman *v.* Western, etc., Co., 13 Tex. Civ. App. 169, 36 S. W. 306.
[3] Paul *v.* Virginia, 8 Wall. (U. S.) 168; St. Clair *v.* Cox, 106 U. S. 350; Fritts *v.* Palmer, 132 U. S. 282, 32 L. Ed. 317.
[4] Wright *v.* Lee, 4 S. D. 237, 55 N. W. 931.

The object of this discussion is to inquire into the effect and validity of contracts made by a foreign corporation doing business within the State without having complied with these statutory requirements.[5]

As an incident to the right to exclude foreign corporations and prohibit them from doing business within the State except upon such conditions as the State may choose to impose, the State has the right to deny validity to unauthorized contracts made by a foreign corporation before it has acquired the right to do business in the State. The question, therefore, of the validity of a contract made with a foreign corporation before it has acquired the right to do business in the State is entirely a question of statutory construction.[6]

In the several States there is a variety of legislation, constitutional and statutory, concerning foreign corporations doing business through branch offices and resident agents. The divergent provisions of these statutes have resulted in much apparent conflict of authority and confusion among the decision. There is, however, a real and very decided conflict under statutes in terms identical, or substantially the same, in their provisions. It is without the scope of this article to give an encyclopedic digest of the laws prevailing in the different States; but by the application of recognized principles, it aims in a measure to reconcile some apparently conflicting authorities. Bearing in mind that the intention of the legislature as expressed by statute will always be controlling, it is impossible to lay down any hard and fast rules. Various classifications, all more or less unsatisfactory, have been attempted in a search for some controlling principle to be applied to such statutes with the end in view of arriving at the legislative intent. It is impossible to suggest any general classification which will conform with the law in all States, owing to the fact that the courts in one State have in many instances attached a meaning to language directly opposed to that adopted in construing the same language in another State. After a careful review of the cases, it is believed that the following division of the subject is justified by the authorities, and will in a large measure reconcile numerous cases in apparent conflict. We will consider, I. Those statutes which in express terms declare the legislative intention as to the effect to be given such contracts; II. Those statutes which merely prohibit the corporation from doing business until its requirements are complied with; and III. Those statutes which not only prohibit the corporation from doing business, but declare such business to be unlawful or illegal.

I. A statute expressly declaring a contract made by a foreign

[5] Only executory contracts are considered. Where the contract is fully executed on both sides neither party will be granted relief. Roberts *v.* Hughes (Vt.), 83 Atl. 807.

[6] Edison Gen'l Electric Co. *v.* Canadian Pac. Nav. Co., 8 Wash. 370, 36 Pac. 260, 40 Am. St. Rep. 910, 24 L. R. A. 315.

corporation before it has acquired the right to do business within the State void, on the one hand, or valid and enforceable, on the other, allows no question of construction. The intention of the legislature being plainly expressed, the courts have only to give effect to such expressed intention.[7] Dismissing such cases, attention is now called to those statutes which are silent as to the effect of a contract made by a corporation in disregard of an express prohibition to do business before prescribed formalities are complied with.

II. Where a statute merely prohibits, without declaring unlawful or illegal, the doing of business before compliance with formalities prescribed, with or without a penalty accompanying the prohibition, the legislative intention is by no means clear. Where the prohibition is accompanied by the imposition of a penalty upon the corporation, its officers or agents, it is quite generally held that the contracts of the corporation are valid and enforceable, and that the only effect of the statute is to subject the corporation failing to comply therewith to the penalty expressly named.[8] It is often stated that where the prohibition is not accompanied by an express penalty it will be implied that the legislative intention was to render void contracts made in disregard of the prohibition, as otherwise the prohibition would be nugatory. These cases laying down this rule are generally decided under statutes, presently to be treated, declaring unlawful or illegal business done by the corporation before complying with the formalities required by statute.

It cannot be doubted that such statutes are in derogation of the common law; and as such they should be strictly construed.[9] To declare void a contract, lawful in itself, made in pursuance of a business not declared unlawful nor illegal, but only unauthorized because of one party having failed to comply with certain formalities entirely disassociated with the contract itself, would seem to be a decided departure from a strict construction of these statutes, and a presumption of legislative intention quite doubtful, to say the least. The mere fact that the legislature saw fit to add no burdensome penalty for non-compliance with formalities pre-

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[7] Rogers *v.* Simmons, 155 Mass. 259, 29 N. E. 580.

[8] Toledo Tie & Lmbr. Co. *v.* Thomas, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925; Edison Gen'l Electric Co. *v.* Canadian Pac. Nav. Co., *supra;* La France Engine Co. *v.* Mt. Vernon, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. Rep. 827; Helvetia Ins. Co. *v.* Allis Co., 11 Colo. App. 264, 53 Pac. 242; Garratt Ford Co. *v.* Vermont Mfg. Co., 20 R. I. 187, 37 Atl. 948, 78 Am. St. Rep. 852, 38 L. R. A. 545; Galletty *v.* Strickland, 74 S. C. 394, 54 S. E. 576. The Virginia statute is similar to those involved in these decisions. For a discussion of the Virginia statute with reference to this question, see 7 VA. LAW REG. 306 and note to Nat'l Mutual, etc., Ass'n *v.* Ashworth, 1 VA. LAW REG. 519.

[9] Toledo Tie & Lmbr. Co. *v.* Thomas, *supra.* The federal courts, though following the State decisions, will apply the rule of strict construction. See David Lupton Sons Co. *v.* Automobile Club, 225 U. S. 489, 56 L. Ed. 1177.

scribed can hardly be a justification for implying an intention that in lieu of such penalty the contracts of the corporation are void. It might with equal force be argued that the imposition of a penalty itself implies an intention to regard the contracts illegal and void. And the clear weight of authority under statutes declaring merely that the corporation "shall not be permitted" to do business, or employing words to that effect, is that contracts of the corporation made in disregard of such prohibition are nevertheless valid and enforceable, even though no express penalty is attached.[10] The only effect of these statutes is to render the corporation subject to proceedings by the State to oust it from doing business.

III. A common form of statute not only prohibits foreign corporations from doing business, with or without a penalty added, but declares that it shall be unlawful or illegal to do business before its requirements have been complied with. Where such language has been employed, without the imposition of a penalty, the great weight of authority is to the effect that the contracts made in furtherance of a business declared unlawful or illegal are void when sought to be enforced by the corporation.[11] Where, however, a penalty is imposed the conflict is more pronounced. Not a few courts, on the ground that the penalty is intended as exclusive, and applying the maxim, *expressio unius est exclusio alterius,* hold the contract valid and enforceable by the corporation.[12] Probably a majority, either disregarding the penalty, or else considering its imposition the stronger reason for implying an intention that contracts made in pursuance of a business declared unlawful or illegal are void, deny any claim of the corporation thereunder and hold these contracts void and unenforceable.[13] The recent case of *Oliver Co.* v. *Louisville Realty Co.* (Ky.),[14] 161 S. W. 570, after reviewing the authorities, finally settles the law in Kentucky in favor of this view.

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[10] David Lupton Sons Co. *v.* Automobile Club, *supra;* Cooper *v.* Ft. Smith, etc., Ry. Co., 23 Okla. 139, 99 Pac. 785; Wright *v.* Lee, *supra.* See also State *v.* American Book Co., 69 Kan. 1, 76 Pac. 411, 1 L. R. A. (N. S.) 1041, and Neuchatel Asphalte Co. *v.* New York, 155 N. Y. 373, 49 N. E. 1043, where the contract is held valid though expressly unenforceable by statute.

[11] Ætna, etc., Co. *v.* Harvey, 11 Wis. 412; Cincinnati, etc., Co. *v.* Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Lycoming, etc., Co. *v.* Wright, 55 Vt. 526; Barbor *v.* Boehm, 21 Neb. 450, 32 N. W. 221.

[12] Union Mutual Ins. Co. *v.* McMillen, 24 Ohio St. 67; Connecticut, etc., Ins. Co. *v.* Whipple, 61 N. H. 61; Kindel *v.* Beck, etc., Co., 19 Colo. 310, 35 Pac. 538.

[13] Dudley *v.* Collier, 87 Ala. 431, 6 So. 304, 13 Am. St. Rep. 55, overruling Sherwood *v.* Alvis, 83 Ala. 115, 3 So. 307, as to *dictum* affecting this case; Cary-Lombard Lmbr. Co. *v.* Thomas, 92 Tenn. 587, 22 S. W. 743; Booth & Co. *v.* Weigand, 28 Utah 372, 79 Pac. 570; Fruin-Colnon Co. *v.* Chatterson, 146 Ky. 509, 143 S. W. 6, 40 L. R. A. (N. S.) 857; Model Heating Co. *v.* Magarity, 1 Boyce (24 Del.) 240, 75 Atl. 614.

[14] Overruling Johnson *v.* Mason Lodge, 106 Ky. 838, 51 S. W. 620, and affirming Fruin-Colnon Co. *v.* Chatterson, *supra.*

Since the purpose of all these statutes is to protect citizens in transaction with foreign corporations, the courts almost unanimously deny the corporation the right to set up its violation of statute to defeat a recovery when sued on contract by a citizen.[15] The general expression that the contract is "void," but that the corporation is estopped to deny its validity, would seem to mean no more than that it is voidable at the option of the other party. A few courts allow the corporation to recover on the ground that the other party is estopped.[16] These courts, however, are decidedly in the minority.[17] To invoke the doctrine of estoppel is believed to be entirely unnecessary as the decisions should more properly turn solely upon the legislative intent as expressed in the statute.

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PRESUMPTIONS AS TO UNEXPLAINED ALTERATIONS IN WILLS.—A recent case holds that where an unexplained alteration appears on the face of a will it is presumed to have been made prior to the execution of the will. *In re Easton's Will,* 145 N. Y. Supp. 373. The court bases its decision on the ground that, in the absence of such a statute as the English Wills Act of 1873,[1] the common law of the State, as derived from the common law of England as it existed prior to the Revolution, should govern. The court further contends that by the common law of England, prior to the Revolution, unexplained alterations in wills were presumed to have been made before execution, and the burden of proof was on the party who sought to have the alteration excluded to show that it was made after the execution of the will. The decision is based on a *dictum* in the case of *Crossman* v. *Crossman,*[2] referred to as a leading case on the subject. In that case a will was executed in duplicate, and in one of the copies the name of one of the executors had been left out in copying. The interlineation was made at the bottom of the instrument, and was necessary to make it a duplicate. In the opinion the court said, "Where an interlineation, fair upon the face of an instrument, is entirely unexplained, we do not understand that there is any presumption that it was fraudulently made after the execution of the instrument." The opinion of Judge Brown in *the Matter of Conway,*[3] also referred to in the principal case as authority for this doctrine, was a dissenting opin-

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[15] Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236; Fisher *v.* Traders Ins. Co., 136 N. C. 217, 48 S. E. 667; Young *v.* Gaus, 134 Mo. App. 166, 113 S. W. 735; Showen *v.* Owens Co., 158 Mich. 321, 122 N. W. 640.

[16] La France Engine Co. *v.* Mt. Vernon, *supra.*

[17] See American Amusement Co. *v.* East Lake Chutes Co., 174 Ala. 526, 56 So. 961.

[1] 1 Vict., c. 26, § 21, provides that any interlineation made in a will after its execution shall be of no effect unless re-executed or signed by the testator and the witnesses opposite or near to the interlineation.

[2] 95 N. Y. 145.

[3] 124 N. Y. 455, 26 N. E. 1028.